

**ST 12-02**

**Tax Type: Sales Tax**

**Tax Issue: Responsible Corporate Officer-Failure To File Or Pay Tax**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**JOHN DOE,**

**Taxpayer**

**Docket # XXXX  
Acct ID: XXXX  
NPL ID: XXXX**

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; JOHN DOE, *pro se*

Synopsis:

The Department of Revenue ("Department") issued a Collection Action, Assessment and Notice of Intent ("Assessment") to JOHN DOE ("taxpayer") pursuant to section 3-7 of the Uniform Penalty and Interest Act ("UPIA") (35 ILCS 735/3-7). The Assessment alleges that the taxpayer was an officer or employee of ABC Company, Inc. ("corporation") who was responsible for willfully failing to pay the corporation's retailers' occupation taxes ("ROT"). The taxpayer timely protested the Assessment, and an evidentiary hearing was held. During the hearing, the taxpayer argued that he was not an officer of the corporation and that all of the ROT returns that he signed for the corporation were accompanied with the proper payment. After reviewing the record that was presented by the parties, it is recommended that the liability be affirmed.

FINDINGS OF FACT:

1. The taxpayer was the controller of the corporation. (Dept. Ex. #1; Tr. p. 9)
2. The corporation did business as ABC Manufacturing and was in the business of manufacturing and installing signage. (Dept. Ex. #1, pp. 15-16)
3. On June 15, 2005, the taxpayer signed Form REG-1, Illinois Business Registration Application, which indicated in Step 9 that the taxpayer was the person who was responsible for filing the tax returns and paying the tax due. (Dept. Ex. #1, pp. 15-18)
4. On July 7, 2005, the taxpayer signed Form REG-3-D, Request for Signatures, which indicated in Step 2 that the taxpayer was the person who was responsible for filing the tax returns and paying the tax due. The taxpayer's signature is included in Step 2. (Dept. Ex. #1, pp. 12-14)
5. The taxpayer was initially hired to control construction costs. The taxpayer had contact with the vendors and subcontractors and was involved with the payment of the subcontractors. (Tr. pp. 9-12)
6. The corporation "closed the doors" on August 16, 2009. (Dept. Ex. #1, p. 4)
7. The taxpayer continued to work for the corporation until the business closed. At the time that the business was closing, the corporation had one secured creditor whose loan was still outstanding. The taxpayer assisted the secured creditor with winding up the operations of the business. (Tr. pp. 12-14)
8. On March 21, 2011, the Department issued a Collection Action, Assessment and Notice of Intent, NPL penalty ID: 1140296, to the taxpayer that proposed a total liability of \$4,213.69, including tax, interest, and penalty, for failure to pay ROT for the period ending March 31, 2009. The Assessment was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1, pp. 2-3)

#### CONCLUSIONS OF LAW:

Section 3-7 of the Uniform Penalty and Interest Act provides, in part, as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility

of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon;... 35 ILCS 735/3-7(a).

An officer or employee of a corporation may, therefore, be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the ROT returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

For guidance in determining whether a person is responsible under section 3-7, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (26 U.S.C. §6672)<sup>1</sup>. See Branson v. Department of Revenue, 168 Ill. 2d 247, 254-56 (1995); Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985). These cases state that the critical factor in determining responsibility is whether the person had significant control over the corporation's finances. See Purdy Co. of Illinois v. United States, 814 F. 2d 1183, 1186 (7th Cir. 1987) Responsibility is generally found in high corporate officials who have control over the corporation's business affairs and who participate in decisions concerning the payment of creditors and the dispersal of funds. Monday v. United States, 421 F. 2d 1210, 1214-1215 (7th Cir. 1970), *cert. den.* 400 U.S. 821.

In addition, these cases define "willful" as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious known risks. See Branson, at 254-56; Heartland, at 29-30. Willful conduct does not require bad purpose or intent to defraud the government. Branson, at 255; Heartland, at 30. Willfulness may be established by showing that the responsible person (1) clearly ought to have known that (2) there was a grave risk that the taxes were not being paid and (3) the person was in a position to find out for certain very easily. Wright v. United States, 809 F. 2d 425, 427 (7th Cir. 1987). Furthermore, whether the person in question willfully failed to pay the taxes is an issue of fact to be determined on the basis of the evidence in each particular case. Heartland, at 30; Department of Revenue v. Joseph Bublick &

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<sup>1</sup> This section imposes personal liability on any person who willfully fails to collect, account for, or pay over any tax imposed by the Internal Revenue Code.

Sons, Inc., 68 Ill. 2d 568, 577 (1977). Courts have found that giving preferential treatment to other creditors rather than paying the corporation's taxes constitutes willful behavior. See Heartland, at 29-30.

Under section 3-7, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due.<sup>2</sup> See Branson, at 260. Once the Department presents its *prima facie* case, the burden shifts to the taxpayer to establish that one or more of the elements of the penalty are lacking, *i.e.*, that the person charged was not a responsible corporate officer or employee, or that the person's actions were not willful. *Id.* at 261. In order to overcome the Department's *prima facie* case, the allegedly responsible person must present more than his or her testimony denying the accuracy of the Department's assessment. A. R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34 (1<sup>st</sup> Dist. 1988). The person must present evidence that is consistent, probable, and identified with books and records to support the claim. *Id.*

In the present case, the Department's *prima facie* case was established when the Department's certified record relating to the penalty liability was admitted into evidence. In response, the taxpayer argues that every tax return that he actually signed was accompanied with the proper payment. He contends that he stopped signing the returns sometime during 2007, and he did not sign any of the returns that are the basis of this assessment. In addition, he argues that he was not an officer of the corporation. The company went out of business in August of 2009, and the taxpayer claims that at the time that the business closed, the taxpayer was unaware of any outstanding taxes owed to the State of Illinois.

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<sup>2</sup> The relevant portion of section 3-7 provides as follows: "The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty due under this Section. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy or computer printout of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue.... That certified reproduced copy or certified computer print-out shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be *prima facie* proof of the correctness of the amount of tax or penalty due." 35 ILCS 735/3-7(a).

Unfortunately for the taxpayer, the evidence presented is insufficient to overcome the Department's *prima facie* case. According to the Form REG-1, Illinois Business Registration Application, the taxpayer accepted the responsibility for filing the returns and paying the tax due. The fact that he was not an officer of the corporation does not affect his liability under the statute because section 3-7 imposes personal liability on any "officer or employee." (35 ILCS 735/3-7) The taxpayer was an employee of the corporation and, therefore, may be personally liable under section 3-7. Although he did not sign every return, during the period at issue the taxpayer maintained control over the corporation's finances and the payment of creditors.

In addition, the evidence does not support a finding that the taxpayer did not willfully fail to perform his duties of filing the returns and paying the taxes. The taxpayer worked for the corporation until the business closed. He admitted that he was involved with paying the subcontractors, and he assisted the corporation's one secured creditor with winding up the operations of the business. Although he claims that he was unaware of any outstanding taxes owed to the State of Illinois, considering the fact that there was an outstanding liability owed to the secured creditor, the taxpayer should have known that there was a risk that some of the taxes had not been paid. He was also in a position where he could have verified the same.

#### Recommendation

For the foregoing reasons, it is recommended that the liability be upheld.

Linda Olivero  
Administrative Law Judge

Enter: May 4, 2012